

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

COUNTRY JOE STEVENS,
#27883

Plaintiff,

vs.

DAVID CARROL, *et al.*,

Defendants.

3:10-cv-0277-LRH-VPC

ORDER

This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff's application to proceed *in forma pauperis* is granted. (Docket #1). The court now reviews the complaint.

I. Screening Standard

Pursuant to the Prisoner Litigation Reform Act (PLRA), federal courts must dismiss a prisoner's claims, "if the allegation of poverty is untrue," or if the action "is frivolous or malicious," "fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2). A claim is legally frivolous when it lacks an arguable basis either in law or in fact. *Nietzke v. Williams*, 490 U.S. 319, 325 (1989). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. *Id.* at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. *See Jackson v. Arizona*, 885 F.2d 639, 640 (9th Cir. 1989).

Dismissal of a complaint for failure to state a claim upon which relief may be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and the Court applies the same standard under Section

1 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint. Review under Rule
 2 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. of America*, 232
 3 F.3d 719, 723 (9th Cir. 2000). A complaint must contain more than a “formulaic recitation of the
 4 elements of a cause of action;” it must contain factual allegations sufficient to “raise a right to relief
 5 above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965
 6 (2007). “The pleading must contain something more...than...a statement of facts that merely creates a
 7 suspicion [of] a legally cognizable right of action.” *Id.* In reviewing a complaint under this standard, the
 8 court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex Hospital*
 9 *Trustees*, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to plaintiff and
 10 resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

11 Allegations in a *pro se* complaint are held to less stringent standards than formal pleadings
 12 drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21
 13 (1972) (*per curiam*); *see also Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). All
 14 or part of a complaint filed by a prisoner may be dismissed *sua sponte*, however, if the prisoner’s claims
 15 lack an arguable basis either in law or in fact. This includes claims based on legal conclusions that are
 16 untenable (*e.g.* claims against defendants who are immune from suit or claims of infringement of a legal
 17 interest which clearly does not exist), as well as claims based on fanciful factual allegations (*e.g.*
 18 fantastic or delusional scenarios). *See Neitzke*, 490 U.S. at 327-28; *see also McKeever v. Block*, 932
 19 F.2d 795, 798 (9th Cir. 1991).

20 To sustain an action under section 1983, a plaintiff must show (1) that the conduct complained
 21 of was committed by a person acting under color of state law; and (2) that the conduct deprived the
 22 plaintiff of a federal constitutional or statutory right.” *Hydrick v. Hunter*, 466 F.3d 676, 689 (9th Cir.
 23 2006).

24 **II. Instant Complaint**

25 Plaintiff, who is incarcerated at Northern Nevada Correctional Center (“NNCC”), has sued senior
 26 correctional officer David Carrol, wardens James Baca and Jim Benedetti, and Nevada Department of
 27 Corrections (“NDOC”) Director Howard Skolnik. Plaintiff alleges that on or about August 15, 2009,
 28 he was “verbally attacked” by David Carrol. He claims that Carrol told him “you will raise your hand

1 at count time because you are in a wheelchair.” Plaintiff claims he “took offense” to Carrol’s statement
 2 and that Carrol’s words subjected plaintiff to ridicule by other inmates and staff. Plaintiff submitted a
 3 grievance and asserts that he received his kite back with “AWP James Baca’s threat in retaliation of my
 4 seeking redress.” Plaintiff claims violations of his Fourteenth Amendment rights to equal protection and
 5 due process and that he was threatened with retaliation in violation of his First Amendment rights.

6 **A. Verbal Harassment**

7 Plaintiff claims that he was offended when defendant Carrol “verbally attacked” him, and that
 8 Jim Benedetti and Howard Skolnik were made aware of Carrol’s conduct through the prison grievance
 9 process, but denied the grievance. However, mere verbal harassment or abuse is not sufficient to state
 10 a constitutional deprivation under 42 U.S.C. § 1983. *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th
 11 Cir. 1987); *see also Freeman v. Arpaio*, 125 F.3d 732, 738 (9th Cir. 1997) *overruled in part by Shakur*
 12 *v. Schiriro*, 514 F.3d 878 (9th Cir. 2008). Accordingly, plaintiff’s claims that Carrol’s alleged instance
 13 of verbal harassment violated his Fourteenth Amendment rights to equal protection and due process are
 14 dismissed with prejudice for failure to state a claim. Defendants Carrol, Benedetti and Skolnik are
 15 dismissed from this action.

16 **B. Retaliation**

17 With respect to the retaliation allegations: “A prisoner suing prison officials under [§] 1983 for
 18 retaliation must allege that he [or she] was retaliated against for exercising his [or her] constitutional
 19 rights and that the retaliatory action does not advance legitimate penological goals, such as preserving
 20 institutional order and discipline.” *Barnett v. Centoni*, 31 F.3d 813, 815-16 (9th Cir. 1994) (*per curiam*);
 21 *see also Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005); *Austin v. Terhune*, 367 F.3d 1167-
 22 1170-71 (9th Cir. 2004); *Bruce v. Ylst*, 351 F.3d 1283, 1288 (9th Cir. 2003); *Vignolo v. Miller*, 120 F.3d
 23 1075, 1077-78 (9th Cir. 1997); *Hines v. Gomez*, 108 F.3d 265, 267 (9th Cir. 1997); *Pratt v. Rowland*, 65
 24 F.3d 802, 806 (9th Cir. 1995); *Schroeder v. McDonald*, 55 F.3d 454, 461 (9th Cir. 1995); *Rizzo v.*
 25 *Dawson*, 778 F.2d 527, 532 (9th Cir. 1985). There is a First Amendment right to petition the government
 26 through prison grievance procedures. *See Rhodes*, 408 F.3d at 567; *Bradley v. Hall*, 64 F.3d 1276, 1279
 27 (9th Cir. 1995). “Retaliation against prisoners for their exercise of this right is itself a constitutional
 28 violation,” and a mere threat of retaliation is sufficient injury if made in retaliation for an inmate’s use

1 of prison grievance procedures. *Brodheim v. Cry*, 584 F.3d 1262, 1269-70 (9th Cir. 2009) (citing *Burgess*
2 *v. Moore*, 39 F.3d 216, 218 (8th Cir. 1994); *see also Rhodes*, 408 F.3d at 566. Such claims must be
3 evaluated in the light of the deference that must be accorded to prison officials. *See Pratt*, 65 F.3d at
4 807; *see also Vance v. Barrett*, 345 F.3d 1083, 1093 (9th Cir. 2003). The prisoner must submit evidence,
5 either direct or circumstantial, to establish a link between the exercise of constitutional rights and the
6 allegedly retaliatory action. *Compare Pratt*, 65 F.3d at 807 (finding insufficient evidence) with
7 *Valandingham v. Bojorquez*, 866 F.2d 1135, 1138-39 (9th Cir. 1989) (finding sufficient evidence).
8 Timing of the events surrounding the alleged retaliation may constitute circumstantial evidence of
9 retaliatory intent. *See Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1316 (9th Cir. 1989). Finally,
10 the prisoner must demonstrate that his First Amendment rights were actually chilled by the alleged
11 retaliatory action. *See Resnick v. Hayes*, 213 F.3d 443, 449 (9th Cir. 2000); *see also Rhodes*, 408 F.3d
12 at 568 (explaining that, at the pleading stage, a prisoner is not required "to demonstrate a *total* chilling
13 of his [or her] First Amendment rights to file grievances and to pursue civil litigation in order to perfect
14 a retaliation claim. Speech can be chilled even when not completely silenced.") (emphasis in original);
15 *Gomez v. Vernon*, 255 F.3d 1118, 1127-28 (9th Cir. 2001).

16 Plaintiff alleges he received his kite dated September 21, 2009 back with "AWP James Baca's
17 threat in retaliation of my seeking redress." Plaintiff's retaliation claim is so vague that the court is
18 unable to determine whether it is frivolous or fails to state a claim for relief. Thus, this claim will be
19 dismissed, but plaintiff will be granted leave to amend the complaint.

20 Accordingly, plaintiff's complaint is dismissed. However, plaintiff's allegations that he was
21 threatened for using the prison grievance process may implicate his First Amendments rights. Therefore,
22 plaintiff has leave to file an amended complaint. If plaintiff elects to proceed in this action by filing an
23 amended complaint, he is advised that he should support his claim with specific factual allegations about
24 the defendant's actions. Plaintiff's claims must be set forth in short and plain terms, simply, concisely
25 and directly. *See Swierkeiwicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002); Fed. R. Civ. P. 8.

26 Plaintiff is informed that the court cannot refer to a prior pleading in order to make plaintiff's
27 amended complaint complete. Local Rule 15-220 requires that an amended complaint be complete in
28 itself without reference to any prior pleading. This is because, as a general rule, an amended complaint

1 supersedes the original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files
2 an amended complaint, the original pleading no longer serves any function in the case. Therefore, in an
3 amended complaint, as in an original complaint, each claim and the involvement of each defendant must
4 be sufficiently alleged.

5 **III. Conclusion**

6 **IT IS THEREFORE ORDERED** that plaintiff's application to proceed *in forma pauperis*
7 (Docket #1) without having to prepay the full filing fee is **GRANTED**; plaintiff shall not be required
8 to pay an initial installment fee. Nevertheless, the full filing fee shall still be due, pursuant to 28 U.S.C.
9 § 1915, as amended by the Prisoner Litigation Reform Act of 1996. The movant herein is permitted to
10 maintain this action to conclusion without the necessity of prepayment of fees or costs or the giving of
11 security therefor. This order granting *in forma pauperis* status shall not extend to the issuance of
12 subpoenas at government expense.

13 **IT IS FURTHER ORDERED** that, pursuant to 28 U.S.C. § 1915, as amended by the Prisoner
14 Litigation Reform Act of 1996, the Nevada Department of Corrections shall pay to the Clerk of the
15 United States District Court, District of Nevada, 20% of the preceding month's deposits to the account
16 of Country Joe Stevens, **Inmate No. 27883** (in months that the account exceeds \$10.00) until the full
17 \$350 filing fee has been paid for this action. The Clerk shall send a copy of this order to the attention
18 of Albert G. Peralta, Chief of Inmate Services for the Nevada Department of Prisons, P.O. Box 7011,
19 Carson City, NV 89702.

20 **IT IS FURTHER ORDERED** that, even if this action is dismissed, or is otherwise
21 unsuccessful, the full filing fee shall still be due, pursuant to 28 U.S.C. §1915, as amended by the
22 Prisoner Litigation Reform Act of 1996.

23 **IT IS FURTHER ORDERED** that the Clerk shall **FILE** the complaint (Docket #1-1).

24 **IT IS FURTHER ORDERED** plaintiff's claims for violation of his Fourteenth Amendment
25 rights to equal protection and due process are **DISMISSED with prejudice and without leave to**
26 **amend.**

27 **IT IS FURTHER ORDERED** that Defendants David Carrol, Jim Benedetti and Howard
28 Skolnik are **DISMISSED** from this action.

1 **IT IS FURTHER ORDERED** that plaintiff's complaint is **DISMISSED WITH LEAVE TO**
2 **AMEND**. Plaintiff may file an amended complaint with respect to his claim of retaliation only.

3 **IT IS FURTHER ORDERED** that plaintiff will have **thirty (30) days** from the date that this
4 Order is entered to file his amended complaint, if he believes he can correct the noted deficiencies. The
5 amended complaint must be a complete document in and of itself, and will supersede the original
6 complaint in its entirety. Any allegations, parties, or requests for relief from prior papers that are not
7 carried forward in the amended complaint will no longer be before the Court.

8 **IT IS FURTHER ORDERED** that plaintiff shall clearly title the amended complaint as such
9 by placing the words "FIRST AMENDED" immediately above "Civil Rights Complaint Pursuant to 42
10 U.S.C. § 1983" on page 1 in the caption, and plaintiff shall place the case number, **3:10-CV-00277-**
11 **LRH-VPC**, above the words "FIRST AMENDED" in the space for "Case No."

12 **IT IS FURTHER ORDERED** that plaintiff is expressly cautioned that if he does not timely file
13 an amended complaint in compliance with this order, this case may be immediately dismissed.

14 **IT IS FURTHER ORDERED** that the Clerk shall send to plaintiff a blank section 1983 civil
15 rights complaint form with instructions along with one copy of the original complaint.

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17 DATED this 19th day of July, 2010.

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LARRY R. HICKS
UNITED STATES DISTRICT JUDGE